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I. Introduction

In recent years warranty liability has become an integral component of the overall allocation of burdens and risks for economic and personal injuries in a variety of social and business settings. As a result, warranty concepts are fundamentally important to the contemporary law of products liability and to the sales of goods and housing, two of their most prominent applications. Moreover, a variety of statutes, including Article Two of the Uniform Commercial Code, the Magnuson-Moss Warranty Act,[1] and many state consumer protection statutes,[2] have codified certain aspects of warranty law. Notwithstanding this proliferation of warranty applications and the growing bodies of case and statutory law dealing with warranties in different contexts, several fundamental aspects of warranty theory remain poorly developed. This article will focus on one such area, the concept of warranty duration.

The application and interpretation of warranties, whether governed by statute or common law contract principles, frequently require associating the warranty with specific time periods. For example, to determine when a cause of action for breach of warranty accrues for statute of limitations purposes, courts must relate the warranty to a time frame.[3] In other cases, the question is whether a defect appearing after delivery of the warranty actually constitutes a breach of the warranty.[4] In these and other situations, courts must examine various durational aspects of warranties. By reviewing some of these situations, this article will demonstrate that the judicial and legislative responses to problems concerning the duration of warran-

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1. 15 U.S.C. §§ 2301-12 (1976).
2. *See, e.g.*, CAL. CIV. CODE § 1791.1 (West 1973).
3. *See, e.g.*, Voth v. Chrysler Motor Corp., 218 Kan. 644, 545 P.2d 371 (1976).
4. *See, e.g.*, Ford Motor Co. v. Moulton, 511 S.W.2d 690 (Tenn.), *cert. denied*, 419 U.S. 870 (1974).

ties are inadequate in several respects.

This inadequacy stems from the scant conceptual analysis which courts, legislators, and commentators apply to the role of time in warranty theory. In the absence of any significant development of the theoretical aspects of warranty duration, resolution of warranty duration problems proves difficult. Moreover, the lack of any sound warranty duration theory has contributed to numerous anomalies in the case law dealing with the time-related aspects of warranties. Consequently, significant bodies of case and statutory law are hopelessly unclear or irreconcilable. In an effort to resolve some of these problems, this article proposes a conceptual framework for analyzing warranty duration questions more adequately.

II. Present Confusion Over the Meaning of Warranty Duration

Courts and legislators frequently treat warranty duration as equivalent to answering the question, "How long does the warranty last?"[5] Phrasing the question in this way oversimplifies and confuses the problem by merging several related, but nevertheless distinct, concepts. For example, the statement that a purchaser has a "one-year warranty" is, by itself, almost meaningless. Such terms have, occasionally been construed to mean that the subject item will remain in a specified condition for a period of one year;[6] that certain remedies arise when defects appear within one year;[7] that defects appearing after one year are excluded from the warranty;[8] or that any action for breach of warranty must be brought within one year.[9] This list does not exhaust the approaches that courts and legislatures follow in describing the duration of warranties. Moreover, some courts and legislators employ warranty duration concepts in ways that defy explanation.[10] The variety of possible interpretations indicates that the term "warranty duration" describes not one concept but rather a class of several time-related aspects of warranties. Accordingly, the concept of warranty duration requires consideration not only of the warranty itself but also of the remedies available for its breach and the applicable statute of limitations.

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5. *See, e.g.*, Klondike Helicopters, Ltd. v. Fairchild Hiller Corp., 334 F. Supp. 890, 893 (N.D. Ill. 1971); Wagner Construction Co. v. Noonan, ___ Ind. App. ___, ___, 403 N.E.2d 1144, 1147-48 (1980).

6. *See, e.g.*, Mittasch v. Seal Lock Burial Vault, Inc., 42 A.D.2d 573, 344 N.Y.S.2d 101 (1973).

7. *See, e.g.*, Centennial Insurance Co. v. General Electric Co., 74 Mich. App. 169, 253 N.W.2d 696 (1977) (per curiam).

8. *See, e.g.*, Ford Motor Co. v. Moulton, 511 S.W.2d 690 (Tenn.), *cert. denied*, 419 U.S. 870 (1974).

9. *See* Smith, *The Magnuson-Moss Warranty Act: Turning the Tables on Caveat Emptor*, 13 CAL. W.L. REV. 391, 409 (1977).

10. Gulash v. Stylarama, Inc., 33 Conn. Supp. 108, 364 A.2d 1221 (Conn. C.P. 1975).

III. Warranty Duration and the U.C.C.

Because of the apparent, although perhaps illusory, precision with which the U.C.C. purports to deal with these problems, the Code provides a good starting point for an analysis of warranty duration concepts. Problems involving the time-related aspects of warranties arise under several U.C.C. sections, most notably those dealing with the period of limitations on actions,[11] limitations on remedies,[12] and disclaimers of warranties.[13] Application of these provisions to the various durational features of warranties raises profound questions about the very nature of warranty protection.

A. The U.C.C. Statute of Limitations

Time periods affect warranty rights and obligations under the U.C.C. in several significant ways. The restriction on warranty actions imposed by the statute of limitations is the clearest example of the effect of time on warranty liability. Under section 2-725[14], a buyer has four years from the date of a breach of warranty to bring an action, although this period may be shortened to not less than one year by agreement of the parties.[15] The difficulty in applying section 2-725 lies in determining when a warranty is breached. To facilitate this task, the statute stipulates that a warranty is breached when tender of delivery is made, regardless of the buyer's knowledge of the breach, unless the warranty "explicitly extends to future performance . . . and discovery of the breach must await the time of such performance . . . ."[16]

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11. U.C.C. § 2-725 (1977).
12. *Id.* at § 2-719.
13. *Id.* at § 2-316.
14. Section 2-725 of the U.C.C. provides:

> (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
>
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.
>
> (3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.
>
> (4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act becomes effective.

15. *Id.* at § 2-725(1).
16. *Id.* at § 2-725(2). *See* Raymond-Dravo-Langenfelder v. Microdot, Inc., 425 F.

In applying this provision, courts generally have held that the *implied* warranties of merchantability[17] and fitness for a particular purpose[18] cannot *explicitly* relate to future performance.[19] The distinction suggested by section 2-725(2) parallels a distinction in pre-Code warranty law between present and prospective warranties.[20] Under that view, a "present warranty related only to the condition of goods at the time of sale," while a "prospective warranty related to the future state of the goods."[21] Thus, a warranty that a burial vault would give "satisfactory service at all times" related explicitly to future performance.[22] A sale of a computer subject to the plaintiff's post-delivery approval of the programming created a warranty relating to future performance.[23] Not surprisingly, a statement that a fire

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Supp. 614, 618 (D. Del. 1976).

17. U.C.C. § 2-314.

18. *Id.* at § 2-315.

19. *See, e.g.*, Wright v. Cutler-Hammer, Inc., 358 So. 2d 444, 445 (Ala. 1978); General Motors Corp. v. Tate, 257 Ark. 347, 352, 516 S.W.2d 602, 605-06 (1974); Owens v. Patent Scaffolding Co., 77 Misc. 2d 992, 998-99, 354 N.Y.S.2d 778, 785 (Sup. Ct. 1974), *rev'd on other grounds, per curiam*, 50 A.D.2d 866, 376 N.Y.S.2d 948 (1975); Thalrose v. General Motors Corp., 8 U.C.C. Rep. Serv. 1257, 1258 (N.Y. Sup. Ct. 1975); Schmitt & Hanko, *For Whom The Bell Tolls—An Interpretation of the U.C.C.'s Exception as to Accrual of a Cause of Action for Future Performance Warranties*, 28 ARK. L. REV. 311, 317, 326 (1974); Note, *Merchantability and the Statute of Limitations*, 50 NOTRE DAME LAW. 321, 321 (1974).

While recognizing the general rule, one court rather confusingly stated:

> Merely because it is reasonable to expect that a warranty of merchantability extends for the life of a product, does not mean that "such a warranty explicitly extends to future performance." . . . . In order for the warranties to extend to future performance, the warranty must be *explicit*.

Wilson v. Massey-Ferguson, Inc., 21 Ill. App. 3d 867, 871, 315 N.E.2d 580, 583 (1974) (emphasis in original). The court apparently believed that, while the warranty of merchantability relates to future performance, it fails to qualify for the exception under § 2-725 simply because it is not an expressed warranty.

At least one court, however, has declined to follow the majority rule. In Klondike Helicopters, Ltd. v. Fairchild Hiller Corp., 334 F. Supp. 890, 893 (N.D. Ill. 1971), the court, after quoting § 2-725(a) and recognizing the exception for warranties of future performance, said:

> This exception also seems applicable to plaintiff's Count III. Plaintiff alleges that defendant breached both express and implied warranties. These warranties relate to the merchantability of the aircraft. It seems reasonable to expect a warranty of this nature to continue beyond the tender of delivery and extend for the life of the product. For this reason, the alleged warranties extended to future performance within the meaning of Section 2-725(2). The four year period began to run from the date of discovery of the alleged breach . . . .

See also Moore v. Puget Sound Plywood, Inc., 214 Neb. 14, 187, 332 N.W.2d 212, 215 (1983) (expectation of parties, not expressed in contract, that siding "would last the lifetime of the house" held to create warranty of future performance). *Cf.* Wilson v. Massey-Ferguson, Inc., 21 Ill. App. 3d 867, 871, 315 N.E.2d 580, 583 (1974) (suggesting that implied warranty of merchantability extends for the life of a product, but nevertheless adopting majority rule).

20. *See* Holdridge v. Heyer-Schulte Corp. of Santa Barbara, 440 F. Supp. 1088, 1101 (N.D.N.Y. 1977); Schmitt & Hanko, *supra* note 19, at 313-14.

21. Holdridge v. Heyer-Schulte Corp. of Santa Barbara, 440 F. Supp. 1088, 1101 (N.D.N.Y. 1977).

22. Mittasch v. Seal Lock Burial Vault, Inc., 42 A.D.2d 573, 573-74, 344 N.Y.S.2d 101, 103 (1973).

23. Rochester Welding Supply Corp. v. Burroughs Corp., 78 A.D.2d 983, 983-84, 433 N.Y.S.2d 888, 889 (1980) (per curiam).

truck was "guaranteed for one year" was held not to be "a mere representation of the product's condition at the time of delivery" but rather a statement about the product's "performance at a future time."[24]

Section 2-725(2) presumes that all warranties, expressed or implied, relate only to the condition of the goods at the time of sale. As a result, the period of limitations begins to run at that time, unless the warranty explicitly refers to the performance of the goods at some later time. One common warranty provision — a promise to repair or replace defective goods within a stated time period — does not neatly fit into this distinction. Most courts correctly recognize that a promise to repair or replace defective goods or components in the future is not a statement that the goods will perform in any specified fashion in the future. These courts reason that a promise to repair does not make a warranty extend to future performance.[25] In *Centennial Insurance Co. v. General Electric Co.*,[26] the defendant, G-E, sold an electric transformer to a buyer. The sales contract provided that G-E would correct any defect upon proper notification within one year from the date of shipment.[27] The buyer discovered soon after installation that the transformer was damaged but failed to bring suit until more than four years from the date of delivery and installation. To avoid summary judgment based on the four-year statute of limitations, the buyer's subrogee, the plaintiff in the action, argued that G-E's promise to correct defects within one year from the date of shipment constituted a warranty explicitly extending to future performance for purposes of § 2-725(2). The court disagreed, finding that this provision was not "a warranty for future performance, but rather, a specification of the remedy to which

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24. Commissioners of Fire District No. 9 v. American La France, 176 N.J. Super. 566, 573, 424 A.2d 441, 445 (App. Div. 1980); *see also* Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp., 453 F. Supp. 527, 536-37 (W.D. Pa. 1978). *See generally* Annot., 93 A.L.R.3d 690 (1979).

25. *See, e.g.*, Voth v. Chrysler Motor Corp., 218 Kan. 644, 648-52, 545 P.2d 371, 375-78 (1976); Commissioners of Fire District No. 9 v. American La France, 176 N.J. Super. 566, 573, 424 A.2d 441, 445 (App. Div. 1980); Shapiro v. Long Island Lighting Co., 71 A.D.2d 671, 671, 418 N.Y.S.2d 948, 950 (1978) (per curiam); Owens v. Patent Scaffolding Co., 77 Misc. 2d 992, 998-99, 354 N.Y.S.2d 778, 785 (Sup. Ct. 1974), *rev'd on other grounds*, 50 A.D.2d 866, 376 N.Y.S.2d 948 (1975); *see also* Herbstman v. Eastman Kodak Co., 68 N.J. 1, 12, 342 A.2d 181, 187 (1975).

26. 74 Mich. App. 169, 253 N.W.2d 696 (1977) (per curiam).

27. The pertinent text of the warranty, as quoted by the court, was as follows:

> If it appears within one year from the date of shipment by the Company that the equipment delivered hereunder does not meet the warranties specified above and the Purchaser notifies the Company promptly, the Company shall thereupon correct any defect, including non-conformance with the specifications, at its option, either by repairing any defective part or parts or by making available at the Company's plant, a repaired or replacement part.

Id. at 171 n.1, 253 N.W.2d at 697 n.1.

buyer is entitled should breach be discovered within the first year."[28] The court reasoned that the clause was at best ambiguous and thus did not satisfy the requirement that the warranty *explicitly* relate to future performance.[29]

The plaintiff also contended that the promise to correct any defect was a separate contractual obligation that was breached apart from the breach of warranty and was governed by a separate four year period of limitations. Without citing any authority, the court dismissed this argument as manifestly fallacious.[30]

At least one court disagrees with this view. In *Space Leasing Associates v. Atlantic Building Systems, Inc.*,[31] the Georgia Court of Appeals, in a case apparently governed by pre-Code law, mentioned section 2-725 and stated that "[w]hile a breach of warranty generally occurs upon delivery of the goods regardless of the time of discovery of the breach under Code Ann. § 109A-2-725, where there is an agreement to repair or replace, the warranty is not breached until there is a refusal or failure to repair."[32]

If the courts are correct in treating a promise to repair or replace defective parts not as a warranty about the performance of the goods but rather as a remedy available for a breach of warranty,[33] then the view of the court in *Centennial Insurance* is, at least partially, correct. Section 2-725(2) is inapplicable to promises to repair because such promises are not warranties, and subsection 2 relates only to actions for breach of warranty. If there is any action for breach of a promise to repair, it must then be governed by section 2-725(1), and the question then becomes when does such a breach occur. The *Space Leasing Associates* court apparently holds that the breach occurs upon failure to repair or lack of success in repairing.

The approach of the *Centennial Insurance* court, however, goes further than merely precluding the application of § 2-725(2) to

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28. *Id.* at 171, 253 N.W.2d at 697. *But see* Standard Alliance Industries, Inc. v. Black Clawson Co., 587 F.2d 813, 821 n.17 (6th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979).

29. 74 Mich. App. at 171, 253 N.W.2d at 697.

30. The court stated:

Plaintiff's alternative argument that the one year repair or replacement provision constitutes a separate contract, that was breached separately from the contract of sale, is without merit. Plaintiff's argument is in essence that by failing to remedy its first breach, the defendant committed a second breach, giving rise to a brand new cause of action and starting anew the limitations period. The fallacy of this approach is apparent. If we adopted plaintiff's position, limitations periods could be extended for virtually infinite time. We doubt that the Legislature intended such a result.

Id. at 172, 253 N.W.2d at 697.

31. 144 Ga. App. 320, 241 S.E.2d 438 (1977).

32. *Id.* at 325, 241 S.E.2d at 441.

33. The distinction between warranties and remedies is crucial not only to the proper application of U.C.C. §§ 2-316, 2-719 and 2-725 but also to a sound resolution of many of the problems of warranty duration. For a more extensive analysis of the distinction and its implications, see the text accompanying notes 52-59 *infra*.

promises to repair; it also holds that there is no independent cause of action, governed by either subsection 1 or 2, for breach of a promise to repair. Precisely why this result should obtain is not clear, although the court in *Centennial Insurance* thought the reason for this was apparent.[34] Whatever the reason, in cases in which the promise to repair extends beyond the applicable period of limitations measured from the date of the sale, the *Centennial Insurance* court's approach would result in a finding that no cause of action exists for the breach of that promise, no matter how explicitly it specifies the period of time.

The trial court reached this result in *R.W. Murray Co. v. Shatterproof Glass Corp.*,[35] in which the plaintiffs, the owner and the general contractor of a construction project, brought a breach of warranty action against suppliers of materials that proved defective. The contract specifications required that certain glass panels would be replaced if they proved defective within ten years. Additionally, a technical bulletin published by a division of the manufacturer promised that the manufacturer would replace glass panels that showed certain defects within twenty years.[36] Because the complaint was filed between five and seven years after the glass panels were delivered, the trial court held that the four-year statute of limitations under § 2-725 barred any action based on these express warranties. In reaching this result, the trial court stated that the "[p]laintiffs have not alleged the existence of any warranties of future performance" and that a "replacement commitment does not amount to an express warranty of future performance."[37]

The appellate court specifically rejected the trial court's analysis and reversed. Relying on *Binkley Co. v. Teledyne Mid-America*

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34. *See supra* note 30 and accompanying text.

35. 529 F. Supp. 297 (E.D. Mo. 1981), *aff'd in part, rev'd in part*, 697 F.2d 818 (8th Cir. 1983).

36. 529 F. Supp. at 299. The contract warranty provided that:

> Vision and spandrel glass shall be guaranteed by the glass manufacturer to the owner for a period of ten (10) years from date of acceptance of the project to furnish and replace any unit which develops material obstruction of vision between the interglass surfaces. This guarantee is for material and labor costs for replacing.

697 F.2d at 821-22 n.2. Similarly, the manufacturer's warranty provision read:

> Subject to the conditions below, Shatterproof Glass Corporation warrants its insulating glass units for a period of twenty (20) years from the date of manufacture against defects in material or workmanship that result in moisture accumulation, film formation or dust collection between the interior surfaces, resulting from failure of the hermetic seal. Purchaser's exclusive remedy and Shatterproof's "total" liability under this warranty shall be limited to the replacement of any lite failing to meet the terms of this warranty. Such replacement will be made F.O.B. Detroit to the shipping point nearest the installation.

Id. at 822 n.3.

37. 529 F. Supp. at 299. *Cf.* Grand Island School District No. 2 of Hall County v. Celotex Corp., 203 Neb. 559, 568, 279 N.W.2d 603, 609 (1979).

Corp.,[38] the court reasoned that the warranty satisfied the requirements for a warranty explicitly relating to future performance:

> The basic principle underlying *Binkley* is that in order to constitute a warranty of future performance under section 400.2-725(2), the terms of the warranty must unambiguously indicate that the manufacturer is warranting the future performance of the goods for a specified period of time. . . . The terms of both the alleged Shatterproof express warranties in the instant case contain explicit and unambiguous reference to specified periods of time during which the warranty is to be in effect. The count I warranty purportedly extends for a period of ten years from the date of acceptance; the count III warranty extends for twenty years from the date of manufacture of the goods. Thus, it would seem clear that both warranties meet the *Binkley* requirement of reference to a future time.[39]

The court also rejected the trial court's distinction between warranties and promises to repair.

> [T]he district court, focusing on the language in the alleged warranties relating to replacement of defective panels, concluded that these were not warranties of future performance, but only replacement commitments. We do not believe that the presence of language limiting the remedy to replacement of defective materials, by itself, is determinative of the exact nature of the warranties in question. In reaching its conclusion that the warranties were replacement commitments rather than express warranties of future performance, the district court apparently failed to distinguish between the existence of an express warranty of future performance and a limitation *of remedy* in the event of a breach of a warranty.[40]

The court's meaning behind its criticism of the trial court for failing "to distinguish between the existence of an express warranty of future performance and a limitation of remedy" for breach of the warranty is difficult to discern. Most courts, like the trial court in *R.W. Murray*, hold that promises to repair are not warranties of future performance because they are merely remedies for breach of warranty.[41] In fact, the trial court's result in *R.W. Murray* is a direct consequence of that distinction. On the other hand, the appellate court's decision, while no doubt intended to do justice by making promises to repair enforceable, seriously blurs the distinction between warranties of future performance and remedies for breach of

38. 333 F. Supp. 1183 (E.D. Mo. 1971), *aff'd*, 460 F.2d 276 (8th Cir. 1972).
39. 697 F.2d at 823 (citations omitted).
40. *Id.* (emphasis in original).
41. *See supra* notes 17-20 and accompanying text.

warranty.

The *R.W. Murray* opinions illustrate the paradox of the distinction between warranties and remedies in the application of section 2-725(2). While it is reasonable to hold that a promise to repair does not directly warrant the condition of the goods and thus is not a warranty of future performance under section 2-725(2), distinguishing between warranties and remedies under circumstances similar to those in *R.W. Murray* makes the promise to repair illusory and unenforceable. The *R.W. Murray* appellate court avoided that result by blurring the distinction between warranties and remedies. Attempts to apply this distinction consistently create problems which frequently arise in warranty duration cases.

B. Warranties and Remedies Under the U.C.C.

Sections 2-316 and 2-719 are the other principal sources of warranty duration problems under the U.C.C. Section 2-316[42] provides certain general standards for the interpretation of warranty provisions and sets forth standards governing the disclaimer or limitation of warranties. Subsection 4 allows for contractual limitation of "remedies for breach of warranty" in accordance with section 2-719. Section 2-719[43] broadly authorizes, subject to certain limitations,[44]

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42. U.C.C. § 2-316 provides:

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such consideration is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

43. U.C.C. § 2-719 reads as follows:

(1) Subject to the provisions of subsections (2) and (3) of this section and of

contractual limitations on the nature and availability of the buyer's remedies for breach of contract or warranty. Section 2-719(2), however, provides that "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose" all of the Code's remedies may be available to the buyer.

The specificity with which sections 2-316 and 2-719 purport to deal with limitations on warranties and remedies is more illusory than real.[45] The principal difficulty in applying these sections to the duration-related problems under consideration here relates to the distinction between warranties and remedies. While application of these sections clearly requires such a distinction, the Code fails to provide any guidance for drawing the distinction between contractual modifications of warranties and of remedies. As noted earlier,[46] courts have wavered considerably in maintaining a similar distinction in applying section 2-725(2). However, the problems arising under sections 2-316 and 2-719 are, if anything, more intractable.

Examination of the Code's use of the terms "warranty" and "remedy" furnishes some guidance in this area. Since limited warranties and remedies occur most frequently in the context of express warranties, the Code's section on "express warranties" merits substantial consideration. While not actually defining "express warranties," the Code does indicate how they arise. Section 2-313 provides that:

> (1) Express warranties by the seller are created as follows:
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> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made

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the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

44. *Id.* at § 2-719 (2) & (3).

45. *See* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 12-1 at 428 (2d ed. 1980).

46. *See supra* notes 35-40 and accompanying text.

part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.[47]

As the official comments[48] to this section suggest, the concept of express warranty can be treated primarily as requiring that the goods conform to any affirmation of fact or promise relating to the goods. The section, however, fails to clarify the treatment of promises of a remedial character, such as promises to repair or replace defective goods.[49] While such promises do relate to the goods, the goods themselves cannot "conform to the . . . promise" to repair as subsection 1(a) seems to require.

The Code contains neither an express nor an implied definition of "remedy." While section 2-719(1)(a) does provide several examples of how the parties to a contract may properly limit their remedies, this section affords little insight into the essential nature of remedies. Section 2-711[50] addresses a buyer's remedies, but merely

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47. U.C.C. § 2-313.

48. *Id.* comment 3.

49. The federal Magnuson-Moss Warranty Act provides an interesting contrast in its definition of "written warranty":

> The term "written warranty" means—
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> (A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or
>
> (B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking,

which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product. 15 U.S.C. § 2301(6) (1976). This definition explicitly treats promises to take remedial action as within the concept of a warranty.

50. U.C.C. § 2-711 provides the following remedies for buyers:

> (1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid
>
> (a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the

catalogues the Code's remedial sections and thus provides little guidance for distinguishing remedies from warranties.[51]

Notwithstanding the Code's failure to distinguish by definition between warranties and remedies, significant consequences follow from treating a particular contract provision as a warranty or a remedy. If a contract clause is a limitation on a warranty, then it must satisfy the standards of section 2-316, including the requirement of conspicious disclosure. If, on the other hand, the provision is a limitation on remedy, it may be subject, under section 2-719, to arguments that the limited remedy either fails of its essential purpose or is unconscionable.[52] A limitation on warranty presumably is not subject to the constraints of section 2-719 and could fail, assuming that the formal requirements of section 2-316 are met, only under the doctrine of unconscionability under section 2-302.[53] Thus, since the Code fails to provide a clear indication of the proper treatment of

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contract; or

(b) recover damages for non-delivery as provided in this Article (Section 2-713).

(2) Where the seller fails to deliver or repudiates the buyer may also

(a) if the goods have been identified recover them as provided in this Article (Section 2-502); or

(b) in a proper case obtain specific performance or replevy the goods as provided in this Article (Section 2-716).

(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (Section 2-706).

51. The Magnuson-Moss Warranty Act is more explicit, if less comprehensive, in defining "remedy":

> The term "remedy" means whichever of the following actions the warrantor elects:
>
> (A) repair,(B) replacement, or (C) refund;
>
> except that the warrantor may not elect refund unless (i) the warrantor is unable to provide replacement and repair is not commercially practicable or cannot be timely made, or (ii) the consumer is willing to accept such refund.

15 U.S.C. § 2301(10) (1976).

52. *See* 3 R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-316:5 (3d ed. 1983) (recognizing that while the distinction between limitations on remedies and disclaimers of warranties may not be "pragmatically valid," it is nevertheless "manifestly correct" because warranty disclaimers are governed by § 2-316 and remedy limitations by § 2-718 and § 2-719).

53. U.C.C. § 2-302 provides:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

There is considerable dispute over whether § 2-302 is at all applicable to a disclaimer of warranties that meets the requirements of § 2-316. *See* J. WHITE & R. SUMMERS, *supra* note 45, § 12-11 at 478-81.

various clauses, especially the so-called "limited warranties" which contain elements of both warranty disclaimer and remedy limitation, the courts presented with these issues often reach inconsistent results.

Even those courts agreeing that a conceptual distinction exists between warranties and remedies draw the distinction in different ways. For example, in *Williams v. Hyatt Chrysler-Plymouth, Inc.*,[54] an action involving an automobile manufacturer's limited warranty, the court distinguished sections 2-316 and 2-719, saying that while both "are closely related, the former is directed to the creation of a limited *duty* under a warranty, . . . whereas the latter is directed to the limitation of the *remedy* available in the event of a breach of that duty."[55] Other courts have followed some variation of the following formulation:

> A disclaimer of warranties limits the seller's liability by reducing the number of circumstances in which the seller will be in breach of the contract; it precludes the existence of a cause of action. A limitation of remedies, on the other hand, restricts the remedies available to the buyer once a breach is established.[56]

One court qualified this statement, holding that "[a] disclaimer or modification of warranty eliminates the quality commitment."[57]

Distinguishing a warranty from a remedy on grounds that a warranty imposes a duty on the seller and a remedy determines what happens upon breach of that duty creates some difficulties, especially in cases involving limited warranties, which impose upon the seller a *duty* to repair or replace defective goods. As noted above,[58] most courts, in the context of section 2-725(2), would treat the seller's *duty* to repair or replace not as a warranty but as a remedy. If those courts are correct, then the distinction between a warranty and a remedy based on the duty analysis is useless.

Some courts, however, reject any real distinction between the two. One of the earliest cases adopting this position is *Standard Alliance Industries, Inc. v. Black Clawson Co.*,[59] in which the plaintiff

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54. 48 N.C. App. 308, 269 S.E.2d 184 (1980).

55. *Id.* at 315, 269 S.E.2d at 188 (emphasis in original).

56. Murray v. Holiday Rambler, Inc., 83 Wis. 2d 406, 414, 265 N.W.2d 513, 517-18 (1978). *Accord* Gladden v. Cadillac Motor Car Division, General Motors Corp., 83 N.J. 320, 330, 416 A.2d 394, 399 (1980). This formulation is essentially that offered by J. WHITE & R. SUMMERS, *supra* note 45, § 12-11 at 471-72 (footnote omitted):

> A disclaimer clause is a device used to control the seller's liability by reducing the number of situations in which the seller can be in breach. A remedy limitation or exclusion, on the other hand, restricts the remedies available to one or both parties once a breach is established.

57. Hahn v. Ford Motor Co., ___ Ind. App. ___, ___, 434 N.E.2d 943, 952 (1982).

58. *See supra* notes 25-26 and accompanying text.

59. 587 F.2d 813 (6th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979).

brought suit on a "warranty" to repair or replace defective parts. While the parties agreed that this was a "warranty," the court observed in a footnote that such a provision did not really fit the Code's definition of "warranty"[60] but was probably better termed a "remedy."[61] Nevertheless the court noted that several decisions indicated that:

> contractual provisions to repair or replace defective parts for a period of one year were not warranties extending into the future for one year, but remedies to be invoked should something go wrong. We see no conceptual distinction between saying that a product is warranted for one year against defects, the remedy limited to repair or replacement and saying that should a breach be discovered within one year, the seller will repair or replace defective parts. Both are warranties explicitly extending to future performance. We recognize that there may be differences between remedies and warranties, *see* fn. 10, but we do not believe that these distinctions make a difference here.[62]

Presumably the court meant that the distinction between warranties and remedies is necessary in applying sections 2-316 and 2-719, but that the distinction is not controlling under section 2-725(2). This approach, however, leaves application of the Code in a curious position. According to the *Black Clawson* court, the term "warranty" means one thing in section 2-316 and another in section 2-725. The result of the court's analysis is that, while there is no conceptual distinction between disclaimers of warranties and limitations on remedies, the proper application of the Code requires drawing such a distinction.[63]

To the extent that application of the Code effectively requires distinguishing between warranties and remedies, a time limitation associated with a warranty may relate either to the warranty itself or to the remedies available upon breach of the warranty, or it may be a contractual modification of the statute of limitations. If the time limitation relates to the *warranty*, it is subject to section 2-316. Thus, if the limitation satisfies that section's requirements, which do not address the reasonableness of the limitation, then the provision could be attacked, if at all, only on grounds of unconscionability.[64]

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60. U.C.C. § 2-313. *See supra* note 47 and accompanying text.

61. 587 F.2d at 818 n.10.

62. *Id.* at 821 n.17.

63. *See* U.C.C. § 2-316(4). *Cf.* R.W. Murray Co. v. Shatterproof Glass Corp., 697 F.2d 818, 823 (8th Cir. 1983) (recognizing that the Code contemplates a distinction between warranties of future performance and limitations of remedies and holding that a promise to replace defective parts is a warranty of future performance). *But see* K-Lines, Inc. v. Roberts Motor Co., 273 Or. 242, 246, 541 P.2d 1378, 1381 (1975) (strict liability case noting that disclaimers of warranty and limitations of remedy "are substantially identical").

64. *See supra* note 53.

However, if the provision is a limitation of *remedy*, section 2-719 governs. The limitation is then potentially subject to avoidance wherever the provision causes the limited remedy to fail of its essential purpose. Alternatively, if the provision is a modification of the statute of limitations, it is subject to section 2-725(1), which without qualification allows the parties to reduce the period of limitations to not less than one year. It is unclear whether such a shortened period of limitations could be challenged on grounds of unconscionability. Notwithstanding the apparent need to determine the precise character of the warranty's specific time provision before application of the pertinent U.C.C. provisions, a number of courts have held, without discussion or elaboration, that the buyers' claims were barred because the warranties had expired or because the claims were untimely.[65]

Some decisions hold that certain time-related warranty provisions are periods within which defects must appear. For example, this is the interpretation usually given to warranties on new automobiles. These warranties commonly provide that the manufacturer warrants the goods to be free from defects and promises to repair or replace defective parts for a stated period of time or until some number of miles are driven.[66] However, clauses limiting the warranty to defects appearing within a certain period of time have elements of both warranty and remedy limitations.[67] Notwithstanding the uncertainty about the precise character of such provisions, a number of courts allow the buyer to avoid discovery periods that are unreasonably short under the circumstances.[68] While most of the cases so hold-

65. *See, e.g.*, Henderson v. General Motors Corp., 152 Ga. App. 63, 63, 262 S.E.2d 238, 239 (1979); General Motors Corp. v. Halco Industruments, Inc., 124 Ga. App. 630, 633, 185 S.E.2d 619, 621 (1971); Smith v. Ford Motor Co., 59 Ohio App. 2d 41, 45, 392 N.E.2d 1287, 1292 (1978); *see also* Christopher v. Larson Ford Sales, Inc., 557 P.2d 1009, 1013 (Utah 1976).

66. *See, e.g.*, Lieb v. Milne, 95 N.M. 716, 720, 625 P.2d 1233, 1237 (1980); Broe v. Oneona Sales Co., 100 Misc. 2d 1099, 1101, 420 N.Y.S.2d 436, 437 (Sup. Ct. 1978); Ford Motor Co. v. Moulton, 511 S.W.2d 690, 694 (Tenn.), *cert. denied*, 419 U.S. 870 (1974); Tracy v. Vinton Motors, Inc., 130 Vt. 512, 514, 296 A.2d 269, 271 (1972); *see also* Dennin v. General Motors Corp., 78 Misc. 2d 451, 452, 357 N.Y.S.2d 668, 670 (Sup. Ct. 1974); Chapman v. Neil, 25 U.C.C. Rep. Serv. 1296, 1299 (Tenn. Ct. App. 1978). *But cf.* United States Fidelity & Guaranty Co. v. North American Steel Corp., 335 So. 2d 18, 21-22 (Fla. Dist. Ct. App. 1976) (promise to repair defects "provided claim is made within one year" apparently held subject to U.C.C. § 2-607 and § 1-204, as a contractual specification for time period for giving notice of breach).

67. *See* Wilson Trading Corp. v. David Ferguson Ltd., 23 N.Y.2d 398, 402, 244 N.E.2d 685, 689 (1968) (clause limiting time within which notice of defects must be given could also be treated as a modification of a warranty of merchantability).

68. *See, e.g.*, Majors v. Kalo Laboratories, Inc., 407 F. Supp. 20, 22-23 (M.D. Ala. 1975) (maximum period of 120 days to discover defect in soybean innoculant); Neville Chemical Co. v. Union Carbide Corp., 294 F. Supp. 649, 655 (W.D. Pa. 1968), *aff'd in part, rev'd in part*, 422 F.2d 1205 (3d Cir.), *cert. denied*, 400 U.S. 826 (1970) (clause waiving all claims for defects unless notice given within fifteen days held unenforceable under U.C.C. § 2-719); Wilson Trading Corp. v. David Ferguson, Ltd., 23 N.Y.2d 398, 404-05, 244 N.E.2d 685, 687-88 (1968) (notice required within ten days after receipt of shipment); Weisz v. Parke-Bernet Gal-

ing have involved relatively short periods of time and latent defects, one court suggests that a one-year, 12,000 miles-limitation period in an automobile warranty might be avoided if, because of a fundamental defect, the limitation proved unconscionably short.[69]

Finally, in applying express warranties, most courts hold that, unless it provides otherwise, the warranty relates to the condition of goods at the time of the contract or shipment.[70] As a result, to prove a breach of warranty, a plaintiff must establish that the goods were defective at the time of sale.[71]

IV. Magnuson-Moss Warranty Act

Congress' enactment of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act[72] in 1975 compounded the difficulty in resolving warranty duration problems under the U.C.C. Since the Act must be applied in conjunction with U.C.C. warranty principles,[73] Congress created an apparent paradox with respect to the U.C.C.'s implied warranty of merchantability. Generally, the Act prohibits a supplier of consumer goods from disclaiming or modifying any implied warranty when the supplier makes any written warranty.[74] The only exception to this prohibition, contained in section 2308(b), provides that the "implied warranties may be limited in duration to the duration of a written warranty of reasonable duration."[75] The Act, however, fails to define the term "duration." Under

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leries, Inc., 67 Misc. 2d 1077, 1083, 325 N.Y.S.2d 576, 582-83 (N.Y. City Civ. Ct. 1971), *rev'd on other grounds*, 79 Misc. 2d 80, 351 N.Y.S.2d 911 (Sup. Ct. 1974) (ten-day period). It is unclear whether these holdings are premised on U.C.C. § 2-719(2), dealing with the failure of the essential purpose of a limited remedy, or U.C.C. §§ 2-719(3) and 2-302, dealing with unconscionability.

69. Taterka v. Ford Motor Co., 86 Wis. 2d 140, 150-51, 271 N.W.2d 653, 657 (1978).

70. *See, e.g.*, Sessa v. Riegle, 427 F. Supp. 760, 768 (E.D. Pa. 1977), *aff'd without opinion*, 568 F.2d 770 (3d Cir. 1978); Q. Vandenberg & Sons, N.V. v. Siter, 204 Pa. Super. 392, 398, 204 A.2d 494, 497 (1964); *see* 3 R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-313:45 (3d ed. 1983).

71. *See* Q. Vandenberg & Sons, N.V. v. Siter, 204 Pa. Super. 392, 398, 204 A.2d 494, 497 (1964); R. ANDERSON, *supra* at note 61; *but see* Huebert v. Federal Pacific Electric Co., 208 Kan. 720, 725, 494 P.2d 1210, 1215 (1972) (products liability action).

72. 15 U.S.C. §§ 2301-12 (1976).

73. *See id.* at § 2301(7).

74. *Id.* at § 2308(a).

75. *Id.* at § 2308(b). The entire subsection provides that:

> For purposes of this chapter (other than section 2304(a)(2) of this title), implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.

The California Song-Beverly Consumer Warranty Act also provides for limiting the duration of the implied warranty of merchantability.

> The duration of the implied warranty of merchantability and where present the implied warranty of fitness shall be co-extensive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is reasonable; but in no event shall such implied warranty have a duration of less than 60 days nor more than one year following the sale of new

section 2-725(2) of the U.C.C., the implied warranty of merchantability relates only to the condition of the goods at the time of sale and not to future performance of the goods.[76] Since Magnuson-Moss draws upon both state law and U.C.C. implied warranty principles,[77] section 2308's reference to limitation of the duration of the U.C.C. implied warranties is difficult to construe.

The legislative history accompanying the Act and the similar bills introduced concurrently offer no clarification of the Act's intended meaning on this point. The 1973 and 1974 Senate and House reports make only passing reference to section 2308 and provide no explanation of the precise aspects of the implied warranties to which the term "duration" refers.[78] Throughout the reports and the hearings held between 1970 and 1973 on similar bills, are assumptions that some unspecified aspect of the implied warranty of merchantability extends beyond the date of the sale and that this relates to how long the goods themselves should last.[79] On several

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consumer goods to a retail buyer. Where no duration for an express warranty is stated with respect to consumer goods, or parts thereof the duration of the implied warranty shall be the maximum period described above.

CAL. CIV. CODE § 1791.1(c) (West 1973). A substantially identical provision, with modified time periods, applies to a sale of used goods. *Id.* at § 1795.5(c).

76. *See supra* notes 17-19 and accompanying text.

77. 15 U.S.C. § 2301(7) (1976) (defining "implied warranty" as that "arising under State law" as modified by the Act).

78. *See, e.g.*, S. Rep. No. 1408, 93d Cong., 2d Sess. 25 (1974); H.R. Rep. No. 1606, 93d Cong., 2d Sess. 25 (1974); H.R. Rep. No. 1107, 93d Cong., 2d Sess. 40 (1974). The most explicit explanation of the provisions of § 2308(b) in the Congressional reports appears in S. Rep. No. 151, 93d Cong., 1st Sess. 21 (1973), where Senator Magnuson's committee wrote:

> Subsection (b) of section 108 has been included in the bill to clarify the relationship between implied warranties and express warranties. The subsection states that implied warranties may not be limited as to duration either expressly or impliedly through a designated warranty in writing or other express warranty. This provision clarifies the relationship between express and implied warranties on consumer products, by maintaining the independence of one from the other. This will mean that the implied warranties, created by operation of law, can only be limited by operation of law and not "expressly or impliedly" by an express warranty. As a result, suppliers and consumers are placed on equal footing when determining how long a particular implied warranty lasts. Through negotiation between consumer and supplier (and ultimately through determination by courts if that becomes necessary) the duration of an implied warranty such as the warranty of fitness for ordinary use would be established. Thus, a consumer whose warranty in writing for one year is unenforceable because the warranted product malfunctioned one year and six days after the time of purchase might still have recourse against the supplier for warranty of fitness for ordinary use.
>
> It is not the intent of the Committee to alter in any way the manner in which implied warranties are created under the Uniform Commercial Code. For instance, an implied warranty of fitness for a particular purpose which might be created by an installing supplier is not, in many instances, enforceable by the consumer against the manufacturing supplier. The Committee does not intend to alter currently existing state law on these subjects.

79. *See Warranties and Guarantees: Hearings on H.R. 18056, H.R. 10690, H.R. 12656, H.R. 16872, H.R. 13390, H.R. 18578, H.R. 12293, & S. 3074 Before the Subcomm. on Commerce & Finance of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 85-86 (1970). During one hearing the following exchange took place between Congressman Eckhardt and Wallace Breuner, Director & Chairman, Warranty & Guaranty

occasions during hearings held in 1971, witnesses and Congressmen questioned the intended effect of section 2308(b), but no one clearly explained what the provision was intended to do.[80] Indeed, at one point Congressman Eckhardt said, "Frankly, I have trouble with the whole section. I don't know precisely what it attempts to have done,

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Comm., Nat'l Home Furnishings Ass'n:

> Mr. Eckhardt . . . .
>
> . . . I understand you support legislation that would prevent an express negative of the warranty for fitness for use, but you would like to have the one exception, that you be permitted to put a time limit even on the implied warranty for fitness of use. Do I understand you right on that?
>
> Mr. Breuner. Correctly. That is correct.
>
> Mr. Eckhardt. I wonder if you need even to qualify it to that extent. I would assume that the warranty of fitness for use would generally only assure that the product was usable for the purpose intended, and that the question of duration would pretty well depend on the question of reasonableness . . . .
>
> Mr. Breuner. Yes.
>
> Mr. Eckhardt. But, then, why permit them to say that the implied warranty for fitness for use in this respect shall only be in effect for, say, a year? I assume that under your qualification they could negative the implied warranty of fitness for use after a year.
>
> Now, it is possible that after a chair has been used a year it has already served what one should reasonably expect to be its useful period. I rather doubt that. I think it would rather vary on the basis of the product. But it worries me to permit negativing of an implied warranty of fitness for use even on such a time basis. What do you think about that?
>
> Mr. Breuner. Do you feel that there is any limit to that? Is there some limit in your mind? What would be the limit, to answer your question with a question?
>
> Mr. Eckhardt. I believe it is a common law question, as the whole question of implied warranty for fitness of use is a common law question, and at least in most jurisdictions I suppose it is a common law question that might be governed by statute.
>
> Mr. Breuner. For instance, how long should an upholstery fabric wear; do you know?
>
> Mr. Eckhardt. What the jury says it should wear. That is the way we decide most questions of time.
>
> Mr. Breuner. Reasonable.
>
> Mr. Eckhardt. That is right.
>
> Mr. Breuner. Except you never know how things are used.
>
> Mr. Eckhardt. I should have said within reason, you are correct. It would have to be on some standard and if the jury went too far out of line, for instance, if they said that some 25-year-old fabric should never have ripped when a child jumped on it with her high heels, I assume that would go a little beyond the scope that would be permitted to the jury.
>
> Mr. Breuner. You are hitting some of the questions that I deal with day to day as the manager of a store. I think there has to be some limit to it.
>
> Mr. Eckhardt. But it would seem to me that it ought to be limited on the basis of reasonableness rather than on a specific contractual negativing of implied warranty for fitness for use. That is just a thought.

Id.

80. *See, e.g., Consumer Warranty Protection; Hearings on H.R. 6313, H.R. 6314, H.R. 261, H.R. 4809, H.R. 5037, H.R. 10673 (and similar and identical bills) Before the Subcomm. on Commerce & Finance of the House Comm. on Interstate & Foreign Commerce*, 92d Cong., 1st Sess. 183, 186 (1971) (statement of Thomas Nichol, Jr., General Counsel, Gas Appliance Manufacturers Assoc. (suggesting that Act thereby confuses the issue of when the statute of limitations begins to run). *See also id.* at 265 (statement of Bruce Wilson, Deputy Ass't Attorney General for Consumer Affairs, Dept. of Justice), 278, 284 (statement of Edward Berlin, General Counsel, The Consumer Federation of America), 442 (statement of L.N. Hunter, Managing Director, Air Conditioning & Refrigeration Institute).

and I am one of the authors of the bill, frankly."[81]

The courts have not yet addressed the meaning of this section,[82] and commentators who have raised the issue do not agree on its import.[83] Several writers assume without question that the Act's reference to duration of the implied warranties can refer only to the statute of limitations on actions for breach of warranty.[84] Another writer, however, in a thorough and well reasoned analysis of the Act, concludes that, while section 2308(b) could be interpreted in three different ways, the most plausible reading is that the period of duration of the implied warranties refers to the period within which the defect must appear.[85] In light of the background of general warranty law, this latter conclusion seems most likely. Nevertheless, the exact intent of section 2308(b) remains unclear.

V. Warranty Duration Outside the U.C.C.

Many of the same problems that arise in construing durational aspects of U.C.C. warranties have also arisen in the context of non-U.C.C. warranties, both express and implied. As in the U.C.C. cases, some courts in concluding that a particular warranty "expired" have not made clear which aspects of the duration concept were involved in reaching the broad conclusion.[86]

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81. *Id.* at 187.

82. A few courts, in dealing with unrelated matters, essentially paraphrase the statutory provision but provide no analysis of its intent in this regard. Hahn v. Ford Motor Co., ___ Ind. App. ___, ___, 434 N.E.2d 943, 953 (1982); Ventura v. Ford Motor Corp., 180 N.J. Super. 45, 62, 433 A.2d 801, 810 (App. Div. 1981).

83. Several articles discuss the section and the corresponding provisions of the California Song-Beverly Consumer Warranty Act, CAL. CIV. CODE §§ 1791.1(c), 1795.5(c) (West 1973), without indicating clearly the precise effect of a limitation on the duration of implied warranties. *See, e.g.*, Clark & Davis, *Beefing Up Product Warranties: A New Dimension in Consumer Protection*, 23 KAN. L. REV. 567, 590-91, 611 (1975); Comment, *Consumer Product Warranties—The FTC Steps In*, 9 J. MAR. J. PRAC. & PROC. 887, 900 & n.84 (1976) (section 2308(b) means that implied warranties "will be in effect . . . for at least a reasonable time period"); Comment, *Consumer Warranty Law in California Under the Commercial Code and the Song-Beverly and Magnuson-Moss Warranty Acts*, 26 UCLA L. REV. 583, 638 (1979); Comment, *Toward an End to Consumer Frustration—Making the Song Beverly Consumer Warranty Act Work*, 14 SANTA CLARA L. REV. 575, 595-96 (1974) (suggesting that duration of implied warranties is extended to include "prospective breach").

84. Saxe & Blejwas, *The Federal Warranty Act: Progress and Pitfalls*, 22 N.Y.L. SCH. L. REV. 1, 21-22 (1976); Smith, *The Magnuson-Moss Warranty Act: Turning the Tables on Caveat Emptor*, 13 CAL. W. L. REV. 391, 409 (1977).

85. Brickey, *The Magnuson-Moss Act—An Analysis of the Efficacy of Federal Warranty Regulation as a Consumer Protection Tool*, 18 SANTA CLARA L. REV. 73, 100-09 (1978). Brickey's distinction among three possible interpretations of the Act — that it relates to the statute of limitations, makes prospective breaches subject to the implied warranties, or relates to the time within which is must appear — is the most thorough treatment of the statute in light of the applicable U.C.C. and warranty concepts.

86. *See, e.g.*, Gulash v. Stylarama, Inc., 33 Conn. Supp. 108, 114, 364 A.2d 1221, 1225 (C.P. 1975) (without analyzing whether one-year warranty provision related to future performance, set a time within which defects must appear, or imposed a one-year statute of limitations, court barred claim under warranty where defects did not appear for two and one-half years).

Consistently with the U.C.C. decisions, some courts have held that unless specified otherwise, a warranty applies only to conditions existing at the time of contracting.[87] Other courts have suggested that even some implied warranties may have effect beyond the date of the contract.[88] In one case an agreement for the sale and installation of elevators was followed by a separate five-year maintenance contract under which the manufacturer agreed to maintain the equipment.[89] The court read the two contracts together and held, "The implied warranty may not continue for the entire useful life of the product . . . . We hold this language [of the maintenance contract] continued the implied warranty at least through the duration of the maintenance contract . . . ."[90]

One well established exception to the principle that implied warranties relate only to conditions at the time of contracting occurs in cases construing the implied warranty of habitability in sales of residential housing. Many courts, without specifying the aspects of warranty duration to which they were referring, have held that the implied warranty of habitability endures for a "reasonable time."[91] While it is not clear precisely what such statements are intended to mean, the most likely interpretation is that the implied warranty of habitability is a prospective warranty, i.e., that the home is habitable

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87. *See, e.g.*, Stone v. Farmington Aviation Corp., 363 Mo. 803, 808, 253 S.W.2d 810, 812 (1953); *see also* McCloskey & Co. v. Wright, 363 F. Supp. 223, 226 (E.D. Va. 1973) (architect's breach of warranty with respect to sufficiency of plans "occurred" for statute of limitations purposes when defective plans were tendered, regardless of when defect became apparent); *cf.* Dittman v. Nagel, 43 Wis. 2d 155, 163, 168 N.W.2d 190, 194 (1969) (holding that plaintiff must prove warranty was breached at time of contract, although plaintiff has reasonable opportunity thereafter to discover breach and notify seller).

88. Aced v. Hobbs-Sesack Plumbing Co., 55 Cal. 2d 573, 584-85, 12 Cal. Rptr. 257, 263-64, 360 P.2d 897, 903-04 (1961) (non-U.C.C. implied warranty of merchantability held to include prospective warranty that goods would last for reasonable period of time); *see also* Scott v. Guschov, 348 Mass. 75, 78, 202 N.E.2d 241, 243 (1964) (warranty that heating system would achieve certain results when tested at zero outside temperature within one year from date of contract; court held warranty "continued at least for one year" but that warranty was "broken from the time it was given").

89. *First National Bank of Arizona v. Otis Elevator Co.*, 2 Ariz. App. 80, 406 P.2d 430 (1965), *modified on rehearing on other grounds*, 2 Ariz. App. 596, 411 P.2d 34 (1966).

90. *Id.*, 2 Ariz. App. at 88-89, 406 P.2d at 438-39.

91. *E.g.*, Sims v. Lewis, 374 So. 2d 298, 304-05 (Ala. 1979); Wagner Construction Co. v. Noonan, ___ Ind. App. ___, ___, 403 N.E.2d 1144, 1147-48 (1980); Elden v. Simmons, 631 P.2d 739, 741 (Okla. 1981); Jeanguneat v. Jackie James Construction Co., 576 P.2d 761, 764 (Okla. 1978); Padula v. J.J. Deb-Cin Homes, Inc., 111 R.I. 29, 33, 298 A.2d 529, 532 (1973); Tavares v. Horstman, 542 P.2d 1275, 1282 (Wyo. 1975); *see* Note, *Elden v. Simmons: The Standard of Reasonableness Prevails—Implied Warranties of New Home Construction Do Not "Necessarily Terminate on Resale in Oklahoma,"* 17 TULSA L.J. 753, 779-80 (1982). *See generally* Weeks v. Slavik Builders, Inc., 24 Mich. App. 621, 629, 180 N.W.2d 503, 507, *aff'd per curiam*, 384 Mich. 257, 259, 181 N.W.2d 271, 271-72 (1970) (under Michigan statute cause of action for breach of warranty accrues on discovery that defect cannot be repaired); Krol v. York Terrace Building, Inc., 35 Md. App. 321, 328-29, 370 A.2d 589, 594 (Ct. Spec. App. 1977) (construing duration and statute of limitations of Maryland's statutory warranty of habitability); Note, *Liability of the Builder-Vendor Under the Implied Warranty of Habitability—Where Does It End?*, 13 CREIGHTON L. REV. 593, 599-604 (1979) (discusses primarily statute of limitations cases).

when sold and will remain habitable for a reasonable time.[92]

In light of the lack of unanimity in determining the present or prospective character of non-U.C.C. warranties, it is hardly surprising that courts have not agreed on how such warranties should be treated for statute of limitations purposes. Some courts have taken an approach similar to that dictated by U.C.C. section 2-725 and have held that warranties were breached and that the cause of action for breach accrued at the time of performance of the original contract.[93] At least one court, however, held that a cause of action for breach of an implied warranty that was treated as prospective in character did not accrue until the defect was discovered.[94] Another court held that a warranty given by a seller of real property which specified that the seller agreed to repair any substantial defects within one year of the date of closing was breached upon the seller's refusal to cure the defect.[95]

Despite diversity in form and factual setting of the warranties themselves, cases outside the U.C.C. raise many problems similar to those appearing under the U.C.C. Perhaps to no one's surprise, the courts, in attempting to resolve warranty problems without the guidance of a systematic warranty statute like the U.C.C., have often been unclear about the concepts with which they have approached warranty questions; nevertheless, there is a broad conceptual similarity between the difficulties attending interpretations of both non-U.C.C. and U.C.C. warranties.

For example, a number of courts have been forced to determine whether a given warranty was a warranty concerning future performance of some item or service or merely a promise to repair certain defects.[96] One court held that a "guarantee to keep the roof

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92. *But see* Sims v. Lewis, 374 So. 2d 298, 305 (Ala. 1979) (suggesting that reasonable time period is for discovery of defects).

93. *See, e.g.*, McCloskey & Co. v. Wright, 363 F. Supp. 223, 226 (E.D. Va. 1973) (architect's breach of warranty with respect to architectural plans occurred for statute of limitations purposes when plans were tendered); Roberts v. Richard & Sons, Inc., 113 N.H. 154, 156-57, 304 A.2d 364, 366 (1973) (cause of action for breach of warranty for defective construction work accrued when work performed, not when defect appeared).

94. Hepp Bros. v. Evans, 420 P.2d 477, 482 (Okla. 1966); *see* Aced v. Hobbs-Sesack Plumbing Co., 55 Cal. 2d 573, 384-85, 12 Cal. Rptr. 257, 263-64, 360 P.2d 897, 903-04 (1961); B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 11, 149 S.E.2d 570, 577-78 (1966) (cause of action for breach of warranty accrues upon discovery of breach); *cf.* Weeks v. Slavik Builders, Inc., 24 Mich. App. 621, 629, 180 N.W.2d 503, 507, *aff'd per curiam*, 384 Mich. 257, 259, 181 N.W.2d 271, 271-72 (1970) (applying Michigan statute and holding cause of action for breach of warranty accrues upon discovery that defect not remediable).

95. Spinso v. Rio Rancho Estates, Inc., 96 N.M. 5, 9 n.3, 626 P.2d 1307, 1311 n.3 (Ct. App.), *cert. denied*, 96 N.M. 17, 627 P.2d 412 (1981).

96. *See, e.g.*, Shuster v. Sion, 86 R.I. 431, 433, 136 A.2d 611, 612 (1957) (contract specifying that installer was "responsible for anything that goes wrong a year from the date of completion" was a warranty that "system would give reasonably satisfactory performance for a year").

installed by us . . . in perfect condition for . . . ten years,"[97] with certain specifications on how repairs would be made in the event of leaks, was not merely a covenant to repair the roof in the event of leaks but was also a warranty obligating the installer to keep the roof in perfect condition regardless of the defect.[98] On the other hand, a provision in a roofing contract calling for a ten-year "maintenance guarantee" and accompanied by a ten-year promise to repair leaks has been construed to mean that the roof would not leak for ten years.[99] While cases such as the foregoing implicitly recognize a distinction between warranties of performance and promises to repair, it is difficult to see how such a distinction could be drawn based upon the results in those cases.

The concept of a warranty with an express time period within which defects must appear has also been developed in non-U.C.C. cases.[100] For example, in *Shafer v. Reo Motors, Inc.*,[101] a warranty on a bus stipulated that the bus was free from defects in materials and workmanship and that the seller's obligation was limited to repair of defective parts which were returned before the earlier of ninety days from the date of delivery or 4,000 miles.[102] After driving the bus more than 4,000 miles, the buyer complained that the bus was defective in design, materials and workmanship. Because the warranty constituted the seller's sole obligation with respect to the goods and because the defect was asserted after the time period specified in the warranty, the court affirmed a grant of summary judgment for the seller.[103] Although the defect, even if it were a design defect, may have existed from the date of manufacture and delivery, there was no coverage under the warranty. A number of courts, however, have found that time limitations on asserting claims for defects, especially if the time limitation is short and the defect is latent, may not be enforceable.[104]

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97. Port of Seattle v. Puget Sound Sheet Metal Works, 124 Wash. 10, 12, 213 P. 467, 467 (1923).

98. *Id.*, at 12, 213 P. at 467-68; *cf.* Russ v. Lakeview Development, Inc., 133 N.Y.S.2d 641, 645 (N.Y. City Civ. Ct. 1954) (warranty against all defects for one year not a covenant to repair for one year).

99. Rowson v. Fuller, 230 S.W.2d 355, 356, 358 (Tex. Civ. App. 1950).

100. *See, e.g.*, Goldman v. Mahony, 354 Mass. 705, 708-09, 242 N.E.2d 405, 409 (1968) (warranty of sound construction "for a period of one (1) year" applied to all leaks appearing within one year); Russ v. Lakeview Development, Inc., 133 N.Y.S.2d 641, 645 (N.Y. City Civ. Ct. 1954) (warranty that construction be free from defects for one year applied to all defects appearing within stipulated time); *see also* Yamnitz v. Polytech, Inc., 586 S.W.2d 76, 80 (Mo. Ct. App. 1979).

101. 205 F.2d 685 (3d Cir. 1953).

102. *Id.* at 687.

103. *Id.*

104. *See., e.g.*, Community Television Services v. Dresser Industries, 435 F. Supp. 214, 216 (D.S.D. 1977), *aff'd*, 586 F.2d 637 (8th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979) (six-month limitation held "manifestly unreasonable" under the circumstances); Torrance v. Durisol, Inc., 20 Conn. Supp. 62, 66, 122 A.2d 589, 592 (Super. Ct. 1956) (ten-day limit);

VI. Warranty Duration Theory Under the U.C.C.

The foregoing summary of warranty duration cases highlights several aspects of the theoretical problem of relating warranties to various types of time periods. The overall inconsistencies and analytical shortcomings of the foregoing cases indicate the principal tasks of any acceptable theory of warranty duration. Because the U.C.C. requires the most intricate application of the analysis of warranty time periods, its provisions offer a useful starting point.

At the outset, it may be instructive to consider how the various Code provisions apply to an expressed or implied warranty which contains no reference to time periods. The implied warranty of merchantability, as previously noted,[105] relates only to the condition of goods at the time of sale or delivery. A defect will breach that warranty, regardless of the moment of discovery, only if the defect existed at the time the goods left the seller's control.[106] The defect need not have been discoverable when the goods departed from his control. Upon finding the defect, the buyer must give notice of the breach to the seller within a reasonable time;[107] the buyer can then wait until the expiration of the statute of limitations — four years from the date of delivery — to bring an action for breach of warranty.[108]

In the foregoing situation, there are four distinct time periods involved. These are as follows: (1) the time with respect to which the condition of the goods is specified; (2) the time for discovery of the defect; (3) the time for giving notice of the defect; and (4) the time for bringing an action for breach of warranty. If the concept of warranty duration has any meaning, it must be as a name for the composite of these four time periods. Subject to certain limitations, the Code permits the parties to specify or modify each of these time periods. In some instances, a limitation on one of the periods will effectively limit another. For example, in the foregoing situation, the statute of limitations provides the only absolute limitation on the time for discovery of defects.

As long as a warranty involves only these four basic time periods, the Code's provisions can be quite easily applied. When, however, the parties by agreement either modify any of these time periods or create additional responsibilities that are tied to a specified time period, application of the Code's provisions becomes signifi-

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Kansas City Wholesale Grocery Co. v. Weber Packing Corp., 93 Utah 414, 420-22, 73 P.2d 1272, 1275 (1937) (ten days).

105. See text accompanying note 70 *supra*.

106. R. Anderson, *supra* note 70 at § 2-313:45; Q. Vandenberg & Sons N.V. v. Siter, 204 Pa. Super. 392, 398, 204 A.2d 494, 497 (1964).

107. U.C.C. § 2-607(3). *See generally* Annot., 93 A.L.R.3d 363 (1979).

108. U.C.C. § 2-725(1), (2).

cantly more problematical. The principal difficulty resides not so much in ascertaining the appropriate time periods but rather in classifying the warranty's provisions for purposes of drawing two crucial distinctions. As illustrated by the cases discussed above, application of the Code's remedy provisions requires distinguishing between warranties and remedies and between warranties of future performance and warranties of present condition. Several types of warranty provisions — most notably promises to repair — are virtual hybrids with respect to these two distinctions. As a result, it is not apparent from the Code's language how it should apply to such warranties.

This problem can be illustrated by considering one common type of warranty, the so-called repair and replacement warranty. A typical warranty of this type expressly guarantees that the goods are free from defects in materials and workmanship. The contract usually provides that the buyer's exclusive remedy under the warranty will be repair or replacement of all defects within a stated period of time, for example, one year.[109] If all other warranties[110] and remedies[111] are properly excluded at the outset, this warranty apparently specifies the condition of goods only at the time of sale.

The determination of how the one-year period relates to each of the four different time periods involved in the concept of warranty duration depends upon how the promise to repair for one year is categorized under pertinent U.C.C. sections. On the surface, the promise to repair does not make any affirmation about the performance of the goods themselves after delivery. Accordingly, the promise appears not to be a warranty explicitly relating to the future performance of goods.[112] The one-year provision, then, does not affect the time with respect to which the condition of the goods is warranted. While this seems the most natural reading of the language of the warranty, the conclusion that the promise to repair is not a warranty of future performance creates difficulties in applying the statute of limitations under U.C.C. section 2-725.

If the promise to repair is not treated as a warranty of future performance, some courts would hold that the one-year promise has no effect on the accrual of the cause of action under section 2-725.[113] As long as the repair promise extends for a period of time less than four years, the purchaser may bring an action whenever the promise

109. This, in essence, is the type of warranty that accompanies the sale of new automobiles, among other products. *See* Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349, 353 n.3, 355 n.9 (Minn. 1977); Annot., 2 A.L.R. 4th 576, § 2 (1980).

110. *See* U.C.C. § 2-316(2).

111. *See* U.C.C. § 2-719(1).

112. *See* Centennial Insurance Co. v. General Electric Co., 74 Mich. App. 169, 171, 253 N.W.2d 696, 697 (1977).

113. *See, e.g., id.*

is breached as long as the action is brought within four years from the date of sale. Where, however, the promise extends for more than four years, as in *R.W. Murray Co. v. Shatterproof Glass Corp.*,[114] construing the promise to repair not as a warranty of future performance but only as a remedy can result in an unenforceable promise after four years.[115] To avoid this result, it is possible either to call the promise to repair a warranty relating to the performance of the goods, as the court of appeals did in *Murray*,[116] or to hold that the promise is an independent covenant or obligation that is not breached until the seller fails to repair, whenever that may occur. As one might anticipate, the courts are divided on the latter alternative[117] and do not offer much justification for their conclusions.

To solve the problem by calling the promise to repair a warranty of future performance is unsatisfactory. Under the Code, a promise to repair does not fit the definition of warranty in section 2-313.[118] Nor is it satisfactory to say that a promise to repair during a stated time is merely a remedy so that there is no remedy for the breach of that promise.[119] The third alternative, holding that a separate breach of contract action may be brought upon breach of the promise to repair, is possible under the terms of U.C.C. section 2-725, but there is scant authority to support such a conclusion.[120]

Moreover, it is unclear why the seller's failure to perform an exclusive remedy for breach of contract should constitute a separate breach. Where the remedy, such as a promise to repair or replace, is the exclusive remedy, it seems more reasonable to hold that the seller's failure to provide the exclusive remedy merely precludes the seller from limiting the buyer to that remedy, which is the effect of U.C.C. section 2-719(2). So long as the failure to provide the remedy occurs within the statute of limitations period, the buyer may still pursue the other remedies available under the Code. In addition, there is no real unfairness in requiring that such an action be brought within four years from the original breach, usually the time of sale. Where, however, the exclusive remedy of repair extends for a period equal to or greater than the statute of limitations, it is conceptually more palatable to hold that the seller is estopped to assert

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114. 697 F.2d 818 (8th Cir. 1983) (ten years).

115. This is the result reached by the trial court in R.W. Murray Co. v. Shatterproof Glass Corp., 529 F. Supp. 297 (E.D. Mo. 1981), *aff'd in part, rev'd in part*, 697 F.2d 818 (8th Cir. 1983).

116. 697 F.2d at 823.

117. *See* text accompanying notes 22-24 *supra.*

118. *See* text accompanying note 37 *supra.*

119. *See* Centennial Insurance Co. v. General Electric Co., 74 Mich. App. 169, 171, 253 N.W.2d 696, 697 (1977).

120. *See* Space Leasing Associates v. Atlantic Building Systems, Inc., 144 Ga. App. 320, 325, 241 S.E.2d 438, 441 (1977).

the statute of limitations[121] in an action brought to enforce the limited remedy rather than to call the remedy a warranty of future performance under U.C.C. section 2-725(2). This approach avoids the result of holding the promise to repair unenforceable beyond the original four-year statute of limitations and does less violence to the terms of the Code, especially the distinction between warranties and remedies.

Related to the difficulty of applying the statute of limitations to promises to repair is the virtual impossibility of applying the warranty/remedy distinction for purposes of U.C.C. sections 2-316 and 2-719. The only certainty on this point is that promises to repair often operate as both warranty limitations and remedy specifications. As noted above, some courts and commentators have distinguished warranty disclaimers from remedy limitations on the basis that a warranty disclaimer limits the seller's liability by defining circumstances under which the seller will be in breach of contract, whereas a remedy limitation specifies remedies available in the event of breach.[122] The suggested distinction is essentially between a clause that determines whether a particular defect is a breach of warranty and one that specifies the remedy for breach.[123] Stated more abstractly, a warranty disclaimer is a clause specifying the class of defects which will breach the seller's warranty of the quality of goods.

While at first glance it may seem incontrovertible that a promise to repair all defects appearing within a stated time merely constitutes a specification of a remedy, this view is neither complete nor accurate. Although such a clause does specify the remedy, when that remedy is the exclusive remedy, the clause operates much more broadly. To see how the clause also operates as a disclaimer of warranty, it is necessary to recall that ordinarily any breach of warranty existing at the time of sale and appearing before the period of limitations has run will support an action for breach of warranty if timely notice of the breach was given. The effect of an exclusive, one-year promise to repair is to reduce the class of defects which breach the warranty. In other words, the clause reduces the class of breaches

121. U.C.C. § 2-725(4) indicates that the Code "does not alter the law on tolling of the statute of limitations." Hence the concept of estoppel to assert the statute of limitations should be available. While most courts hold that a seller's post-breach attempts or promises to repair do not toll the statute, *see* Triangle Underwriters, Inc. v. Honeywell, Inc., 457 F. Supp. 765, 771 (E.D.N.Y. 1978), *aff'd in part, rev'd in part on other grounds*, 604 F.2d 737, 743 (2d Cir. 1979); Annot., 68 A.L.R.3d 1277 (1976), an explicit contractual promise to make a remedy available beyond expiration of the appropriate limitations period makes a much stronger case for applying estoppel. *See* Biocraft Laboratories, Inc. v. USM Corp., 163 N.J. Super. 570, 573, 395 A.2d 521, 522 (App. Div. 1978); *see also* Foodtown v. Sigma Marketing Systems, Inc., 518 F. Supp. 485 (D.N.J. 1980) (fraudulent concealment of cause of action under U.C.C.).

122. *See* text accompanying notes 55-57 *supra*.

123. *See* Hahn v. Ford Motor Co., ___ Ind. App. ___, 434 N.E.2d 943, 952 (1982).

from all defects existing at the time of sale and appearing within four years to only those defects existing at the time of sale and appearing within one year.[124] Because the promise to repair defines the class of defects which breach the warranty and simultaneously specifies the remedy for breach of warranty, such a provision should be treated as both a disclaimer of warranties and a limitation of remedies.[125]

If the one-year provision of the warranty is initially treated as a warranty disclaimer, questions about its effect arise under section 2-316. Depending upon the precise wording and location of the contract provision, there is a possible conflict or inconsistency between a statement that goods are warranted to be free from defects and a separate clause effectively limiting that warranty to defects which appear within a stated time period. One court relied on section 2-316(1)[126] and held that such an inconsistency, where the warranty and time limitation appeared in separate sections of the contract, required that the words creating the warranty prevail over provisions purporting to limit it.[127] This is a rational result whenever the warranty and time limitation appear separately or independently in the contract, although such a result can apparently be avoided if the warranty specifies that the goods are "free from all defects that might appear within the stated time." It would be difficult to argue that in such a clause, the warranty and time limitation cannot be construed consistently and that if they are consistent, both provisions must be given effect.[128]

Most courts agree that warranty disclaimers should be construed strictly against the seller.[129] Because of this rule of construction, it is reasonable to require that a one-year promise to repair or a similar clause, in order effectively to disclaim the warranty as to all defects appearing thereafter until the statute of limitations runs, must set forth that limitation conspiciously[130] and explicitly as part

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124. *See* Wilson Trading Corp. v. David Ferguson, Ltd., 23 N.Y.2d 398, 405, 244 N.E.2d 685, 688-89 (1968).

125. 1 R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE §§ 2-316:12, 2-316:13 (2d ed. 1970). *But cf.* 3 R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-313:47 (3d ed. 1983) (stating that one-year warranty "is not unconscionable and is not affected by UCC § 2-719"). *See also* G. WALLACH, LAW OF SALES UNDER THE UNIFORM COMMERCIAL CODE ¶ 11.11 (1981) (indicating that when clauses have effect of both disclaimer of warranty and limitation of remedy, clauses are subject to both § 2-316 and § 2-719).

126. *See* note 43 *supra.*

127. Wilson Trading Corp. v. David Ferguson, Ltd., 23 N.Y.2d 398, 405, 244 N.E.2d 685, 689 (1968) (express warranty of merchantability and separate clause limiting claims to those discovered within ten days).

128. U.C.C. § 2-316(1).

129. 3 R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-316:14 (3d ed. 1983).

130. U.C.C. § 2-316(2).

of the warranty clause itself. In other words, a provision that is separate from the language creating the warranty but that is intended to limit the warranty by limiting the remedy to repair or replacement within one year should not be effective to limit the warranty to defects appearing within one year, regardless of whether the provision may be effective as a limited remedy under section 2-719. Such a result merely puts the burden on the seller to make clear the effect of the warranty in an effort to avoid misunderstanding.[131] After all, how many purchasers understand that the so-called one-year repair or replacement warranty actually gives them less protection than a warranty which merely limits the remedy to repair or replacement of defects? The seller, therefore, should bear the responsibility of explicitly pointing out that the remedy clause actually limits the warranty as well as the remedy.

If a limited repair or replacement provision satisfies the requirements of section 2-316 as a disclaimer of warranty, the clause should also be subject to scrutiny under section 2-719.[132] The principal limitation on the ability of the parties to designate a particular remedy as the exclusive remedy in the event of breach is contained in the requirement in section 2-719(2) that the limited remedy not "fail of its essential purpose."[133] If a one-year repair or replacement promise is treated as an exclusive remedy, that promise can effectively exclude all other remedies only as long as circumstances do not cause it to fail of its essential purpose. Although courts have given only meager attention to this aspect of so-called limited warranties, consistency requires that, at least in principle, a purchaser be able to attack such a remedy provision when the grounds for applying section 2-719(2) are present. Although few, if any, courts have expressly so held, several decisions support such a conclusion by analogous reasoning. In *Community Television Services, Inc. v. Dresser Industries, Inc.*,[134] a contract for the sale of a television tower contained an express warranty with an exclusive repair and replacement remedy. The warranty required that any claim under the warranty

131. *See* U.C.C. § 2-316 comment 1 (section "seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty . . . .").

132. *See* note 43 *supra*.

133. *See* WALLACH, *supra* note 125 at ¶ 11.11[2][b]; *see generally* Annot., 2 A.L.R. 4th 576, § 5 (1980). It is generally recognized, for example, that where the defect is discovered within the period required by the repair or replacement promise, the seller must effect the promised remedy within a reasonable time or with a reasonable number of repair efforts; otherwise, the limited remedy will fail of its essential purpose. *See, e.g.*, Beal v. General Motors Corp., 354 F. Supp. 423, 426 (D. Del. 1973); Adams v. J.I. Case Co., 125 Ill. App. 2d 388, 402-03, 261 N.E.2d 1, 7-8 (1973); Chapman v. Neil, 25 U.C.C. Rep. Serv. 1296, 1298 (Tenn. Ct. App. 1978).

134. 435 F. Supp. 214 (D.S.D. 1977), *aff'd*, 586 F.2d 637 (8th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979).

be submitted "immediately upon its discovery and in any event within six (6) months after shipment. . . ."[135] The trial court held that in light of the twenty-five year average useful life of such towers, the warranty limitation was manifestly unreasonable and that the limited remedy failed of its essential purpose.[136] This holding was not reviewed on appeal.[137]

In *Taterka v. Ford Motor Co.*,[138] a case involving a standard automobile warranty, the buyer argued that the twelve-month, twelve thousand-mile limited warranty was unreasonable when applied to a latent defect.[139] In considering this contention, the court cited U.C.C. section 2-607(3)(a) and section 1-204 and observed that there was no authority holding such a limitation to be unreasonable.[140] After citing a number of cases in which courts refused to honor short time limitations on giving notice of claims under a warranty,[141] the court stated:

> Each of these case is distinguishable from the present case. In each of them the defect was such that it rendered the product substantially useless to the purchaser shortly after it was purchased.
>
> In the case before us the warranty is clear. Ford's warranty does not cover all manufacturing defects. It only covers those discoverable within 12 months or 12,000 miles. The buyer is to bear the risk of repairs beyond that point. Furthermore, and of particular importance in this case, the car was a long way from being totally worthless to Taterka. He drove it for 90,000 miles. The kind of defect necessary to find a time limit manifestly un-

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135. 586 F.2d at 641-42 n.10.

136. 435 F. Supp. at 216; *see* 586 F.2d at 641-42 (citing *U.C.C.* § 1-204).

137. 586 F.2d at 642.

138. 86 Wis. 2d 140, 271 N.W.2d 653 (1978).

139. 86 Wis. 2d at 150-51, 271 N.W.2d at 657.

140. *Id.* Section 2-607(3)(a) requires that a "buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of the breach . . . ." This requirement is independent of express time limitations on the promise to repair, i.e., the time within which defects must be discovered. Regardless of when the defect must be discovered, the reasonable notice requirement of § 2-607(3)(a) still applies. Other courts have similarly confused the time after discovery when notice of the defect must be given in accordance with § 2-607 and an absolute time limit for discovering defects. *See, e.g.*, United States Fidelity & Guaranty Co. v. North American Steel Corp., 335 So. 2d 18, 21-22 (Fla. Ct. App. 1976) (warranty with promise to repair defects "provided claim is made within one year from Date of Shipment"; court held one-year period was contractual specification of § 2-607 notice period).

141. *See, e.g.*, Majors v. Kalo Laboratories, Inc., 407 F. Supp. 20 (M.D. Ala. 1975) (120 days); Neville Chemical Co. v. Union Carbide Corp., 294 F. Supp. 649 (W.D. Pa. 1968), *aff'd in part, rev'd in part*, 422 F.2d 1205 (3d Cir.), *cert. denied*, 400 U.S. 826 (1970) (fifteen days); Torrance v. Durisol, Inc., 20 Conn. Supp. 62, 122 A.2d 589 (Super. Ct. 1956) (ten days); Wilson Trading Corp. v. David Ferguson, Ltd., 23 N.Y.2d 398, 244 N.E.2d 685 (1968) (ten days); Kansas City Wholesale Grocery Co. v. Weber Packing Corp., 93 Utah 414, 73 P.2d 1272 (1937) (ten days). Of the foregoing cases that were decided under the U.C.C., *Neville Chemical*, *Majors*, and *Wilson Trading Corp.*, all were based, at least in part, upon § 2-719(2).

> reasonable under [U.C.C. § 1-204], or unconscionable under [U.S.C. § 2-302], does not exist here.[142]

The court left open the possibility of a future holding that the twelve-month, twelve thousand-mile warranty is unreasonable when applied to major, latent defects. Curiously, the court never mentioned section 2-719(2), even though the analysis that the court suggested fits well into the framework of that section.

The official comments to section 2-719 indicate that while the Code generally allows parties to limit or modify their remedies by reasonable agreement, there are limitations on that power.[143]

> [I]t is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus any clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed. Similarly, under subsection (2), where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article.[144]

In theory, a promise to repair or replace defects within a stated time period which also acts as a limitation on the time within which defects must be discovered should be subject to scrutiny under section 2-719(2) to the same extent as any other remedy clause. Where because of the magnitude of the defect and the inability to discover it within the stipulated time period, the appearance of the defect after expiration of the limited remedy deprives the buyer of the "substantial value of the bargain," the limited remedy has failed of its essential purpose, and the buyer becomes entitled to all remedies to which he would otherwise be entitled. One method of gauging whether any particular defect is of sufficient magnitude to cause this result would be to compare the effect of the defect on use of the product within the amount of time provided by the warranty for discovery of the defect and the normally anticipated useful life of the product.[145]

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142. 86 Wis. 2d at 150-51, 271 N.W.2d at 657.

143. U.C.C. § 2-719, comment 1.

144. *Id. See generally* WALLACH, *supra* note 125 at ¶ 11.11[2][6]; J. WHITE & R. SUMMERS, *supra* note 45 at § 12-10.

145. *See* Community Television Services, Inc. v. Dresser Industries, Inc., 586 F.2d 637, 641-42 (8th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979) (explaining trial court decision reported at 435 F. Supp. 214, 216 (D.S.D. 1977).

The preceding discussion has considered the limited repair or replacement warranty with respect to three of the four possible time periods embraced by the concept of warranty duration — the time with respect to which the condition of the goods is specified; the time for discovery of defects; and the time for bringing an action. The remaining time period — the time for giving notice of the breach after the defect is discovered — is not directly affected by a limited remedy of repair or replacement within a stated time.[146] Unless the parties agree otherwise, notice of any breach of the warranty must be given within a reasonable time after the defect is discovered or should be discovered.[147] At most, a limited repair or replacement remedy establishes the time within which the breach must be discovered. This alone has no bearing on determining the reasonable time after such discovery for giving notice of the breach. The statute of limitations would presumably provide the outer boundary on the time for giving notice, if a reasonable time after discovery has not expired before the period of limitations has run.

The foregoing analysis indicates that consistent application of various U.C.C. warranty and remedy sections to time-related warranty provisions requires identifying four different time periods to which any warranty or remedy may relate. Only when the time aspects of warranties and remedies are thus specified is it possible to apply the Code's provisions with consistency to the varied warranties and remedy limitations which sellers and buyers may devise.

VII. Warranty Duration Theory Outside the U.C.C.

Although the framework suggested above for analyzing warranty duration questions derives much of its specific detail from U.C.C. warranty and remedy provisions, the basic principles of this analytical framework can be gainfully applied to warranty questions arising outside the U.C.C. The reasons for this are not accidental, for the U.C.C. warranty provisions are at least partially consistent with certain pre-Code warranty principles. For example, common law warranty cases had recognized the distinction between present and prospective warranties, i.e., between warranties that relate to the present condition of products and those which specify the condition of products at some future time.[148] Similarly, it has been a long recognized common law rule, corresponding to U.C.C. section 2-607(3)(a), that a seller must receive notice of a breach of warranty

146. *See* note 140 *supra*.
147. U.C.C. § 2-607(3)(a).
148. *See* Holdridge v. Heyer-Schulte Corp. of Santa Barbara, 440 F. Supp. 1088, 1101 (N.D.N.Y. 1977).

within a reasonable time after the buyer discovers the breach.[149] Application of the suggested analytical framework would provide a reasonable basis for clarifying several aspects of non-Code warranty law.

Having defined the concept of warranty duration as suggested above, one can consider possible interpretations of the Magnuson-Moss Warranty Act provisions that refer to limiting the duration of the implied warranty of merchantability.[150] Considering the Act's provisions in light of the four time periods contemplated by the concept of warranty duration reinforces the conclusion that the Act must refer to limiting the time within which breaches of the implied warranties must appear or be discovered.[151] There is little reason to construe the statute as relating to any of the other three time periods. Generally, the implied warranties created by the U.C.C. are warranties of conditions only at the time of sale,[152] so it would be unreasonable to read the Act to require treating implied warranties as warranties of future performance. Moreover, there is no justification for interpreting the Act as relating either to the statute of limitations or to the buyer's duty to give notice of breaches of the implied warranties as required by U.C.C. section 2-607(3)(a). Thus, unless the Act is read as having no reasonable reference known in the law, it must refer to the time period for discovering breaches of implied warranties.

Thus construed, the Act's provision allowing "limited" warranties[153] to restrict duration of the implied warranties "to the duration of a written warranty of reasonable duration, if such duration is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty,"[154] means that the time for discovery of breaches of the implied warranties must be "reasonable," "conscionable," and clearly displayed. The statute does not define or illustrate what is a "reasonable" or "conscionable" time period, but it may be argued that these terms should be construed with reference to U.C.C. section 2-719(2) and its requirement that limited remedies not fail in their essential purpose[155] and to U.C.C. section 2-302 dealing with unconscionability.

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149. *See, e.g.*, Austin Co. v. Vaughn Building Corp., 643 S.W.2d 113, 115 (Tex. 1982).

150. *See* text accompanying notes 75-77 *supra*.

151. *See* BRICKEY, *supra* note 85 at 107-08.

152. *See* notes 8-11 *supra*.

153. *See* 15 U.S.C. § 2303(a)(2) (1976). Under 15 U.S.C. § 2304(a)(2) (1976), a warranty entitled to use the designation "full" warranty may not limit duration of any implied warranties. Thus, if a supplier gives a "full" warranty, which cannot disclaim the implied warranty of merchantability because of 15 U.S.C. § 2308(a) (1976), the purchaser would be allowed the full statute of limitations period to discover breaches of the implied warranty of merchantability.

154. 15 U.S.C. § 2308(b) (1976).

155. *See* text accompanying notes 143-45 *supra*.

The analysis of warranty duration suggested here could also be employed in addressing warranty duration questions that arise in connection with construction and service warranties, an area where, as already noted, the cases are particularly difficult to reconcile. One problem in many of these cases is determining the time to which the warranted conditions of service or performance apply. For example, the cases holding that the implied warranty of habitability for residential housing lasts for a reasonable time[156] can be interpreted as maintaining that this warranty is a warranty of future performance. In other words, the warranty implies that the home is fit for habitation when it is sold and that it will remain in that condition for a reasonable time. The warranty is breached whenever, between the time of sale and the expiration of a reasonable time, the home fails to remain in that condition. Presumably if a development during that period causes a defect to appear after the expiration of that period, an action would still be timely if brought within the applicable period of years running from the date on which the reasonable period expires. This conclusion follows from the concept, applicable under both the U.C.C. and common law, that a warranty is breached at the time as to which the warranted conditions are stated to exist.[157] If this is a period of time, rather than merely one precise instant such as the moment of contract, the warranty is breached at expiration of the period by a defect existing at that time, even if the defect does not appear until sometime thereafter.[158] A similar result would obtain where a party warrants that a particular job will remain free from defects for a specified period of time. Of course, such a result could be altered by an agreement between the parties which requires that any defects appear, or that notice of any claims be made, within a stated time.

It has occasionally been suggested that there is some relationship between the anticipated useful life of a service or product and a conclusion that any warranty accompanying the service or product is

156. *See* Sims v. Lewis, 374 So. 2d 298, 304-05 (Ala. 1979); Wagner Construction Co. v. Noonan, ___ Ind. App. ___, ___, 403 N.E.2d 1144, 1147-48 (1980); Elden v. Simmons, 631 P.2d 739, 741 (Okla. 1981); Jeanguneat v. Jackie James Construction Co., 576 P.2d 761, 764 (Okla. 1978); Padula v. J.J. Deb-Cin Homes, Inc., 111 R.I. 29, 33, 298 A.2d 529, 532 (1973); Tavares v. Horstman, 542 P.2d 1275, 1282 (Wyo. 1975). *But cf.* Redarowicz v. Ohlendorf, 92 Ill. 2d 171, 185, 441 N.E.2d 324, 331 (1982) (in extending warranty of habitability to subsequent purchasers, court held warranty "limited to latent defects which manifest themselves within a reasonable time").

157. This is not necessarily true for statute of limitations purposes in a jurisdiction that applies a discovery rule for dating accrual of the cause of action. *See, e.g.*, Weeks v. Slavik Builders, Inc., 24 Mich. App. 621, 180 N.W.2d 503, *aff'd*, 384 Mich. 257, 181 N.W.2d 271 (1970).

158. *See* Q. Vandenberg & Sons N.V. v. Siter, 204 Pa. Super. 392, 398, 204 A.2d 494, 497 (1964).

prospective in character.[159] There is, however, no proper conceptual foundation for such a relationship. In the first instance, a warranty, whether expressed or implied, that a particular item is free from defects at the time of contract carries no implied promise that the item will last for its reasonably anticipated useful life. Unless a warranty is expressly prospective in character, it should be construed as relating only to conditions existing at the time of contract.[160] Of course, that an item falls far short of lasting for its anticipated life is some evidence that it was in fact defective at the time of contract.

Similarly, when construing warranties which also include promises that the warrantor will undertake certain actions in the future such as repair or maintenance,[161] care should be taken to distinguish between promises that relate to future conditions or performance of the items in question and those that in effect promise certain actions by the warrantor.[162] The distinction can be important for several reasons. For instance, depending upon the type of promise involved, different events may cause a breach of the agreement. The time at which the breach occurs will also depend upon construction of the promise. In theory, a promise that a roof will not leak for five years is breached whenever the first leak occurs within that period, regardless of discovery. In contrast, a promise to repair any leaks in the roof that appear within five years is not breached until the leak appears and the promisor fails to repair it. In these two situations, just as the events that cause a breach of contract are different, the foreseeable damages flowing from the breach may also be different. In the first instance, the damages should include all loss occasioned by the first leak, but in the second case, since there was no promise that the roof would not leak, the damages would be those attributable to the failure to repair.[163]

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159. *See* First National Bank of Arizona v. Otis Elevator Co., 2 Ariz. App. 80, 88-89, 406 P.2d 430, 438-39 (1965), *modified on rehearing on other grounds*, 2 Ariz. App. 596, 411 P.2d 34 (1966); Aced v. Hobbs-Sesack Plumbing Co., 55 Cal. 2d 573, 584-85, 12 Cal. Rptr. 257, 263-64, 360 P.2d 897, 903-04 (1961). *But see* Beckmire v. Ristokrat Clay Products Co., 36 Ill. App. 3d 411, 413, 343 N.E.2d 530, 532 (1976) (court rejected argument that expectation bricks would last many years affected running of U.C.C. statute of limitations); Citizens Utilities Co. v. American Locomotive Co., 11 N.Y.2d 409, 416-17, 184 N.E.2d 171, 174-75, 230 N.Y.S.2d 194, 198-99 (1962) (alleged oral promise and implied warranty that generator was capable of lasting thirty years barred by six-year statute of limitations running from date of sale).

160. *See* Stone v. Farmington Aviation Corp., 363 Mo. 803, 808, 253 S.W.2d 810, 812 (1953).

161. *See, e.g.*, First National Bank of Arizona v. Otis Elevator Co., 2 Ariz. App. 80, 406 P.2d 430 (1965), *modified on rehearing on other grounds*, 2 Ariz. App. 596, 411 P.2d 34 (1966); Shuster v. Sion, 86 R.I. 431, 136 A.2d 611 (1957); Rowson v. Fuller, 230 S.2d 355 (Tex. Civ. App. 1950); Port of Seattle v. Puget Sound Sheet Metal Works, 124 Wash. 10, 213 P. 467 (1923).

162. *See* Russ v. Lakeview Development, Inc., 133 N.Y.S.2d 641 (N.Y. City Civ. Ct. 1954) (warranty against all defects for one year not a covenant to repair for one year).

163. This conclusion assumes that a promisor's failure to effect promised repairs is an

VIII. Conclusion

The purpose of the foregoing discussion has not been to review exhaustively all time-related warranty provisions or questions but rather to suggest that all questions of warranty duration must be approached from the standpoint of specifying which obligations are related to which time periods. In most warranty transactions there are at least four conceptually distinct time periods governing various aspects of the warrantor's obligations and the purchaser's rights. Most of the uncertainty and confusion in warranty statutes and case law has stemmed from a failure to ascertain clearly which obligations or rights are associated with each of these time periods. For this reason, the very term "warranty duration," as a short hand expression for the notion of how long a warranty lasts, should be abandoned in favor of referring only to each of the specific time periods involved in warranty transactions.

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independent breach of contract that is separately compensable. In the situation hypothesized here this seems reasonable, since the promise to repair is identical to any other executory contractual promise. A different situation may be posed where the promise to repair is a contractually specified, exclusive remedy for any breach of a warranty. The case law is unclear, both under the U.C.C. and the common law, on whether failure to perform a remedy for breach of warranty supports an independent action for breach of contract. *Compare* Centennial Insurance Co. v. General Electric Co., 74 Mich. App. 169, 253 N.W.2d 697 (1977) (per curiam) (failure to effect promised repairs has no effect on running of U.C.C. statute of limitations on warranty actions), *with* Space Leasing Associates v. Atlantic Building Systems, Inc., 144 Ga. App. 320, 241 S.E.2d 438 (1977) (U.C.C. warranty with promise to repair breached upon failure to repair) *and* Spinso v. Rio Rancho Estates, Inc., 96 N.M. 5, 626 P.2d 1307 (Ct. App.), *cert. denied*, 96 N.M. 17, 627 P.2d 412 (1981) (seller's warranty and one-year promise to repair defects in real property breached upon seller's refusal to cure defect). For a discussion of the statute of limitations problem under the U.C.C. concerning non-performance of remedies see text accompanying note 110 *supra*.